U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF V-S-G-, INC.

DATE: NOV. 15, 2018

APPEAL OF NEBRASKA SERVICE CENTER DECISION

PETITION: FORM I-140, IMMIGRANT PETITION FOR ALIEN WORKER

The Petitioner sought to employ the Beneficiary as a software engineer.[1] It requested classification of the Beneficiary as a member of the professions holding an advanced degree under the second preference immigrant classification. Immigration and Nationality Act (the Act) section 203(b)(2), 8 U.S.C. § 1153(b)(2). This employment-based immigrant classification allows a U.S. employer to sponsor a professional with an advanced degree for lawful permanent resident status.

The Petitioner filed the Form I-140 petition on September 26, 2006. The Director of the Nebraska Service Center approved the petition on November 21, 2006. On July 24, 2007, the Beneficiary filed a Form I-485, Application to Register Permanent Residence or Adjust Status, based on the approved Form I-140. On December 16, 2009, the Beneficiary notified U.S. Citizenship and Immigration Services (USCIS) about her intention to change employers to CNC.

In 2010, the Petitioner's two officers pled guilty to crimes relating to fraudulent immigration benefits requests.[2] Because of this fraud scheme, USCIS, as part of an integrity review process, reviewed the merits of all of the Petitioner's immigrant and nonimmigrant cases. As a result, on June 28, 2012, the Director sent the Petitioner a notice of intent to revoke (NOIR) the petition's approval. On October 19, 2012, the Director revoked the petition's approval due to the

[1] The Petitioner is . (VSG). In 2009, the Beneficiary requested to port to another employer, CNC (CNC), under the American Competitiveness in the Twenty-First Century Act of 2000 (AC21). Pub. L. No. 106-313, 114 Stat. 1251, codified in relevant part within the Act at section 204(j), 8 U.S.C. § 1154(j). AC21 allows a beneficiary of an approved employment-based immigrant visa petition, whose adjustment of status application has been pending for more than 180 days, to change jobs or employers if the new job is in the same or similar occupational classification, without relying upon the new employer to file a new labor certification or Form I-140 to support his or her adjustment of status. However, as discussed herein, the terms of AC21 do not allow this Form I-140 to be approved, as the Petitioner's eligibility has not been demonstrated.

[2] Public records indicate that the Petitioner pled guilty to mail fraud in violation of 18 U.S.C. § 1341 on or about 2010. The Petitioner was sentenced to one year probation. The Petitioner's President, and another officer, pled guilty to unlawfully hiring foreign nationals in violation of 8 U.S.C. § 1324(a)(3)(A) and were sentenced to probation of three years. Additionally, the Petitioner and agreed to pay restitution to USCIS in the amount of $236,250. and were also permanently disbarred from participation as an agent or representative of any foreign national with respect to any matter concerning the DOL's foreign labor certification programs.

Petitioner's failure to respond to the NOIR, and the Director subsequently denied the Beneficiary's Form I-485.[3]

On June 10, 2016, the Director vacated the October 19, 2012, decision and certified the case to us. On October 21, 2016, we remanded the petition to the Director for continued review and processing. On December 13, 2016, the Director issued a NOIR to the Petitioner and the Beneficiary. The Director revoked the approval of the petition and invalidated the ETA Form 9089, Application for Permanent Employment Certification, on February 28, 2017, after receiving no response to the December 13, 2016, NOIR.[4] On March 16, 2017, the Beneficiary filed a motion to reopen and motion to reconsider, asserting that she timely filed a response to the NOIR.[5] On July 26, 2017, the Director granted the motion and on October 30, 2017, she affirmed the February 28, 2017, decision revoking the approval of the petition and invalidating the labor certification application.[6] On appeal, the Appellant submits a brief and additional evidence.

Upon *de novo* review, we will dismiss the appeal.

I. REVOCATION REQUIREMENTS

USCIS may approve a petition only if, following an "investigation" or inquiry into the petitioner's claims, it determines "that the facts stated in the petition are true" and the foreign worker is "eligible" for the benefit sought. Section 204(b) of the Act, 8 U.S.C. § 1154(b). Following

[3] The Beneficiary subsequently filed suit in the U.S. District Court for the Southern District of New York challenging the revocation of the Form I-140 approval and the denial of her Form I-485. *See Mantena v. Napolitano*, 2014 WL 2781847 (S.D.N.Y. June 19, 2014). Following an adverse ruling, she appealed the district court's ruling to the Second Circuit Court of Appeals. In *Mantena v. Johnson*, 809 F.3d 721 (2d Cir. 2015), the Second Circuit found that the Beneficiary was within the zone of interest protected by the Form I-140 visa petition process, but remanded for the district court to determine if the Act, as amended by AC21, requires notice pertaining to a visa petition's revocation to parties in addition to the original petitioner of the immigrant visa. The district court remanded the case to the Director for further consideration. In October 2014, the Beneficiary filed another Form I-485 based on an approved Form I-140 filed on her behalf by The second adjustment of status application was subsequently denied.

[4] After granting a petition, USCIS may revoke the petition's approval "at any time" for "good and sufficient cause." Section 205 of the Act, 8 U.S.C. § 1155. If supported by the record, a director's realization that a petition was erroneously approved may justify revocation. *Matter of Ho*, 19 I&N Dec. 582, 590 (BIA 1988). Good and sufficient cause exists to issue a NOIR where the record at the time of the notice's issuance, if unexplained or unrebutted, would have warranted the petition's denial. *Matter of Estime*, 19 I&N Dec. 450, 451 (BIA 1987). Similarly, revocation is proper if the record at the time of the decision, including any explanation or rebuttal evidence provided by a petitioner, warranted a petition's denial. *Id.* at 452.

[5] The Director noted that the response was received without a copy of the first page of the NOIR, which caused it to be delayed by being routed through customer service as correspondence rather than being immediately directed to the record of proceeding.

[6] The Beneficiary filed suit in the U.S. District Court for the Southern District of New York against the Department of Homeland Security (DHS), USCIS, (collectively, the Government) in response to its denial of her adjustment of status applications. On February 5, 2018, USCIS reopened the Beneficiary's adjustment of status applications. On 2018, the court issued an order staying action in the Beneficiary's suit and indicating that the Government should resolve this appeal by 2018. *Mantena v. Hazuda, et al.*, Case 1:17-cv-051142-WHP (S.D.N.Y. Aug. 7, 2018).

approval, if USCIS finds good and sufficient cause to revoke, it may do so at any time. *See* section 205 of the Act, 8 U.S.C. § 1155. If the grounds of revocation fall under 8 C.F.R. § 205.1, USCIS is not required to issue notice to the petitioner and the petition's approval is revoked automatically as a matter of law. Under 8 C.F.R. § 205.2(a), USCIS may revoke approval upon notice, based on any ground other than those specified in 8 C.F.R. § 205.1, "when the necessity for the revocation comes to the attention of [USCIS]."

As discussed at length below, this petition was approved in error. The multiple grounds of ineligibility, coupled with the findings of willful misrepresentation of a material fact, bring it squarely within the statutory and regulatory scheme for revocation on notice.

II. GROUNDS OF REVOCATION WAIVED ON APPEAL

We first note that, in failing to address two grounds of revocation discussed in the Director's decision, the Appellant effectively waives these claims and concedes the issues on appeal. Specifically, the Director revoked the petition's approval on notice, enumerating multiple grounds of ineligibility, including: 1) that the offered position was not eligible for advanced degree professional classification because the terms of the labor certification did not require an advanced degree professional, and 2) that the Beneficiary's experience did not qualify her for advanced degree professional classification, nor did the Beneficiary's experience provide her with the special skills required by the terms of the labor certification. On appeal, the Appellant does not submit additional evidence or point out factual or legal errors in the Director's decision on these two grounds of revocation. Rather, the Appellant states that she relies on her NOIR response. The Director issued two very detailed decisions discussing the basis of these findings. In the absence of any additional evidence or argument, we see no reason to disturb the Director's decision on these matters. When an appellant fails to offer an argument on an issue, that issue is abandoned. *Sepulveda v. U.S. Att'y Gen.*, 401 F.3d 1226, 1228 n.2 (11th Cir. 2005); *Hristov v. Roark*, No. 09–CV–27312011, 2011 WL 4711885, at *1, *9 (E.D.N.Y. Sept. 30, 2011) (plaintiff's claims abandoned when not raised on appeal to the AAO).

As such, the Appellant has not demonstrated that the offered position requires an advanced degree professional, that the Beneficiary's experience qualifies her for the requested classification, or that the Beneficiary possessed the special skills required by the labor certification. The appeal will be dismissed for the above stated reasons, with each considered as an independent and alternative basis. In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

III. GROUNDS OF REVOCATION BRIEFED ON APPEAL

The Director also found that the Beneficiary does not have the education required by the terms of the labor certification, that the Petitioner did not intend to employ the Beneficiary at the worksite stated on the labor certification, and that the Petitioner did not demonstrate its ability to pay the proffered

wage. On appeal, the Appellant addresses each of these grounds, but as discussed below, the assertions made on appeal do not overcome the Director's findings. For the following reasons, we will dismiss the appeal and affirm the Director's revocation on these grounds, with each considered as an independent and alternative basis.

A. The Beneficiary's Education

In revoking the petition's approval, the Director determined that the Beneficiary does not possess the minimum education required for the offered job. A beneficiary must meet all of the requirements of the offered position set forth on the labor certification by the priority date of the petition. 8 C.F.R. § 103.2(b)(l), (12); *Matter of Wing's Tea House*, 16 I&N Dec. 158, 159 (Acting Reg'l Comm'r 1977). The petition was accompanied by a labor certification certified by DOL. During the certification process, DOL evaluated the actual minimum requirements of the offered position, the Beneficiary's representations about her qualifications (without evidence, since this part of the process includes fact-based attestations without supporting documents), and the Petitioner's good faith efforts to identify a qualified, willing, and available U.S. worker to fill the offered position. If a petitioner cannot find a qualified, willing, and available U.S. worker to fill the offered position, and other eligibility criteria are met, DOL certifies the labor certification, which the petitioner attaches to an immigrant visa petition filed with USCIS. *See* section 212(a)(5)(A)(i)(I)-(II) of the Act, 8 U.S.C. § 1182(a)(5)(A)(i)(I)-(II). Thus, the requirements of the offered position are critical because the petitioner advertises to the U.S. work force with those minimum requirements.

According to the terms of the job offer set forth on the labor certification by the Petitioner, the minimum educational requirement of the offered position is a bachelor's degree in computer science, engineering, technology, science, or equivalent.

At Part J of the labor certification, the Beneficiary listed her highest level of education as a bachelor's degree in computer science completed in 1994 at [redacted] in India. The record contains the following documents regarding the Beneficiary's education:

- Primary and secondary school records;
- Bachelor of Arts diploma issued on November 3, 1991, by [redacted] in India;[7]
- Transcripts from [redacted] relating to the bachelor of arts diploma;
- Master of Business Administration (MBA) diploma issued in February 1994 by [redacted]
- Transcripts from [redacted] relating to the MBA;
- Postgraduate diploma (PGD) in computer applications issued on July 24, 1997, by [redacted]; and
- Undated transcripts from [redacted]

[7] The bachelor of arts degree indicates that she studied English, Hindi, politics, philosophy, and economics.

With the petition, the Petitioner submitted an academic credentials evaluation from IndoUS Technology & Educational Services, Inc. (IndoUS). The academic evaluation concluded that the Beneficiary has the equivalent of a master's degree in business administration and a bachelor's degree in computer information systems from an accredited college or university in the United States. The evaluation is based on the Beneficiary's three-year bachelor of arts degree, her two-year MBA, and her one-year PGD.

In the NOIR dated December 13, 2016, the Director advised the Petitioner and the Beneficiary that the evidence did not establish the Beneficiary possessed the minimum education required by the labor certification. The Director consulted the Electronic Database for Global Education (EDGE), an online database created by the American Association of Collegiate Registrars and Admissions Officers (AACRAO).[8] According to EDGE, the Beneficiary's three-year bachelor of arts degree from [redacted] in India is comparable to three years of university study in the United States.[9] Her MBA from [redacted] is equivalent to a bachelor's degree in the United States.[10] The Director noted in the NOIR that the MBA is not in the field of computer science, technology, engineering, or science as required by the labor certification. The Director also noted in the NOIR that the Beneficiary's PGD is not persuasive evidence because the PGD is not an official academic record, and it was not issued by an accredited college or university. The Director requested evidence from the degree granting entities and their accrediting organizations to demonstrate that the Beneficiary has the minimum education required by the labor certification.

In response to the NOIR, the Beneficiary asserted that she meets the primary requirement for the job, a bachelor's degree in computer science, and the alternative requirement, a bachelor's degree in science. She asserted that economics is a science and references a 2013 *New York Times* article entitled "Yes, Economics is a Science." She also noted that her post-secondary studies included biology, physics, and chemistry, and that her master's degree specialized in finance. Citing the website Investopedia, she states that finance is an "art and a science." She also noted her studies in quantitative techniques and management information systems.

The Beneficiary also submitted an evaluation of her education, training, and experience prepared by Associate Professor [redacted] of The City University of New York. The evaluation

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[8] According to its website, AACRAO is "a nonprofit, voluntary, professional association of more than 11,000 higher education professionals who represent approximately 2,600 institutions in more than 40 countries." *About AACRAO*, https://www.aacrao.org/who-we-are (last visited Nov. 14, 2018). According to the registration page for EDGE, EDGE is "a web-based resource for the evaluation of foreign educational credentials." *AACRAO EDGE*, http://edge.aacrao.org/info.php (last visited Nov. 14, 2018). Federal courts have found EDGE to be a reliable, peer-reviewed source of foreign educational equivalencies. *See, e.g., Viraj, LLC v. U.S. Att'y Gen.*, 578 F. App'x 907, 910 (11th Cir. 2014) (holding that USCIS may discount submitted opinion letters and educational evaluations submitted if they differ from reports in EDGE, which is "a respected source of information").

[9] *AACRAO EDGE*, http://edge.aacrao.org/country/credential/bachelor-of-arts-ba-bachelor-of-commerce-bcom-bachelor-of-science-bsc?cid=single (last visited Nov. 14, 2018). A United States baccalaureate degree is generally found to require four years of education. *Matter of Shah*, 17 I&N Dec. 244 (Reg'l Comm'r 1977).

[10] *AACRAO EDGE*, http://edge.aacrao.org/country/credential/master-of-arts-or-commerce?cid=single (last visited Nov. 14, 2018).

concludes that the Beneficiary's bachelor of arts, MBA, and at least four years and five months of work experience are the equivalent of a bachelor of science degree[11] with a dual major in management information systems and business administration. Specifically, the evaluation equates the Beneficiary's three-year bachelor of arts degree to three years of undergraduate study, and it equates the Beneficiary's two-year MBA to a bachelor of science degree in business administration. Further, the evaluation reviewed the Beneficiary's approximately four years and five months of work experience, and concluded that based on the three to one ratio for nonimmigrant visas,[12] the Beneficiary's experience in "management information systems and related areas" was comparable to "university-level training in management information systems." Thus, the evaluation concluded that the Beneficiary received the equivalent of a bachelor of science degree with a dual major in management information systems and business administration based on her combined education and work experience. The evaluation does not mention the Beneficiary's PGD.

In her October 30, 2017, decision, the Director determined that the record does not demonstrate that the Beneficiary holds a foreign equivalent degree to either a United States bachelor's degree or master's degree in the primary or alternate major fields of study required on the labor certification. Accordingly, the Director determined that the record does not establish that the Beneficiary has the education required for the offered job.

The Director reiterated that the Beneficiary's PGD is not persuasive evidence because the PGD is not an official academic record, and it was not issued by an accredited college or university. Further, the Director stated that "in the realm of secondary education, economics and finance are not generally included in the department of science; rather, they are included in the department of business." The Director noted that the Beneficiary's courses in quantitative techniques account for only two out of 19 listed courses in her master's program, and that the vast majority of her courses are business related. The Director also addressed the Bellehsen evaluation and stated that the Beneficiary cannot substitute work experience for required education. Removing the experience from the evaluation establishes that the Beneficiary's bachelor of arts degree and MBA are equivalent to a bachelor's degree in business administration, which is not a required field on the labor certification.

On appeal, the Appellant asserts that the Director's decision provides no authority for her claim that the Beneficiary's PGD must be from an accredited institution. She states that the labor certification application does not require an accredited degree. She states that she has the U.S. equivalent of a bachelor's degree with major fields of study in finance and economics, which are both fields of science.[13] She asserts that the Director failed to cite any authority for her conclusion that work

[11] The evaluation states that she completed graduate level courses in business policy, investment management, industrial relations, and related subjects, and that based on the nature of the courses and the credit hours involved, her degree equated to a bachelor of science.

[12] The evaluation used the rule applicable to H-1B nonimmigrant petitions to equate three years of experience to one year of education, but that equivalence does not apply to immigrant petitions. *See* 8 C.F.R. § 214.2(h)(4)(iii)(D)(5).

[13] The labor certification states that the Beneficiary has a bachelor's degree in computer science, yet the Appellant now claims she has a bachelor's degree in finance and economics. In *Matter of Leung*, 16 I&N Dec. 12, 14-15 (Dist. Dir.

experience and education, taken as a whole, do not constitute the equivalent of a U.S. degree in one of the required fields.

We will first address the Beneficiary's PGD in computer applications, which was issued on July 24, 1997, by [redacted] The regulations governing the EB-2 classification require the submission of an "official academic record" showing the Beneficiary's possession of a foreign equivalent degree. 8 C.F.R. § 204.5(k)(3)(i)(B). The Director indicated that the PGD is not persuasive evidence because the PGD is not an official academic record. In this case, neither the diploma nor the transcripts related to the Beneficiary's PGD list the address of [redacted] or indicate its type of business.[14] Therefore, it is unclear where the Beneficiary actually attended her PGD courses or whether [redacted] is a college, university, school, or other institution of learning. Further, the transcripts indicate that the duration of the PGD course was both 12 months and 18 months, but the document lists no dates of attendance for the individual courses. Therefore, the actual duration of the program is unclear, and we cannot ascertain whether the document was contemporaneously issued with the completion of her degree requirements. *See Matter of Ho*, 19 I&N Dec. at 591-592. For these reasons, we agree with the Director's determination the Beneficiary's PGD is not an official academic record.

We further note that the IndoUS evaluation is the only evaluation in the record that discusses the Beneficiary's PGD. The IndoUS evaluation concluded that based on her bachelor of arts degree, her MBA, and her PGD, the Beneficiary has the equivalent of a bachelor's degree in computer information systems and a master's degree in business administration.[15] However, according to EDGE, a PGD following a two-year bachelor's degree represents attainment of a level of education comparable to one or two year(s) of university study in the United States.[16] EDGE also states that a PGD following a three-year bachelor's degree represents attainment of a level of education comparable to a bachelor's degree in the United States.[17] However, the "Credential Author Notes" section states:

> Postgraduate Diplomas should be issued by an accredited university or an institution approved by the All-India Council for Technical Education (AICTE). Some students complete these diplomas over 2 years on a part-time basis. When examining the Postgraduate Diploma, note the entrance requirement and be careful not to confuse

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1976), dicta of the Board of Immigration Appeals (Board) notes that a beneficiary's credentials, without such fact certified by the DOL on the labor certification, lessens the credibility of the evidence and facts asserted.

[14] When determining whether a document is an official academic record that substantiates the claimed degree, we may consider whether the document was issued in the normal course of business and whether the document was contemporaneously issued with events. *Matter of O-A-, Inc.*, Adopted Decision 2017-03 (AAO Apr. 17, 2017).

[15] The IndoUS evaluation notes the Beneficiary's two MBA courses in quantitative techniques, and lists several computer information systems courses taken by the Beneficiary as part of her PGD program.

[16] *AACRAO EDGE*, http://edge.aacrao.org/country/credential/post-graduate-diploma-pgd?cid=single (last visited Nov. 14, 2018).

[17] *Id.*

> the PGD awarded after the Higher Secondary Certificate with the PGD awarded after the 3-year degree.[18]

Thus, an Indian PGD following a three-year bachelor's degree represents attainment of a level of education comparable to a bachelor's degree in the United States, provided the program required a bachelor's degree for entry and the university was an accredited university or an institution approved by AICTE at the time it issued the PGD. As noted by the Director, the evidence in the record does not establish that the Beneficiary's PGD was issued by an accredited university or an institution approved by AICTE. Although the IndoUS evaluation states that [redacted] is accredited by the University Grant Commission (UGC) of India, it does not state that [redacted] the entity that issued the Beneficiary's PGD, is accredited by UGC or approved by AICTE.[19] On appeal, the Appellant did not submit any evidence establishing that was issued by an accredited university or an institution approved by AICTE. Further, the record does not show that the PGD program required a bachelor's degree for entry. Therefore, according to EDGE, the record does not establish that the Beneficiary's PGD represents attainment of a level of education comparable to a bachelor's degree in the United States.

We will next address the Beneficiary's bachelor of arts degree and MBA from [redacted] in India. EDGE equates the Beneficiary's MBA to a bachelor's degree in the United States. Thus, the Beneficiary has the foreign equivalent of a bachelor's degree. However, her bachelor's degree is not in a permitted field. The permitted fields are computer science, engineering, technology, science, or equivalent.

The evaluations submitted to the record provide conflicting information regarding the Beneficiary's degrees. The IndoUS evaluation indicates that the Beneficiary has the equivalent of a bachelor's degree in computer information systems and a master's degree in business administration. An evaluation in the record from World Education Services, Inc. (WES) states that the Beneficiary has the equivalent of a bachelor's degree in economics and a master's degree in business administration.[20]

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[18] *Id.*

[19] USCIS may, in its discretion, use as advisory opinions statements submitted as expert testimony. However, where an opinion is not in accord with other information or is in any way questionable, USCIS is not required to accept or may give less weight to that evidence. *Matter of Caron Int'l*, 19 I&N Dec. 791 (Comm'r 1988). *See also Matter of D-R-*, 25 I&N Dec. 445 (BIA 2011) (expert witness testimony may be given different weight depending on the extent of the expert's qualifications or the relevance, reliability, and probative value of the testimony); *Viraj, LLC*, 578 F. App'x at 910 (we are entitled to give letters from professors and academic credentials evaluations less weight when they differ from the information provided in EDGE).

[20] Specifically, the WES evaluation equates the Beneficiary's three-year bachelor of arts degree to three years of undergraduate study, and it equates the Beneficiary's two-year MBA to a "Bachelor's and master's degree." The evaluation does not mention the Beneficiary's PGD. The WES evaluation contains only two pages, neither of which provides support for its conclusion. Further, its conclusion conflicts with EDGE, which states that an Indian MBA is the equivalent of a U.S. bachelor's degree.

Another evaluation in the record from [redacted] Professor at Fordham University, states that the Beneficiary's bachelor of arts, MBA, and approximately nine years of work experience equates to a bachelor of science degree with a dual major in management information systems and business administration.[21] The [redacted] evaluation reaches a similar conclusion based on the Beneficiary's bachelor of arts, MBA, and four years and five months of work experience. However, as noted by the Director, work experience cannot be used as a substitute for education. *See* 8 C.F.R. § 204.5(k)(2).

Thus, the Beneficiary's degree fields stated by the evaluations include business administration, computer information systems, economics, and management information systems. The Appellant has not explained the differing conclusions on appeal.[22] Thus, the evaluations are not credible evidence of the Beneficiary's major field of study. Further, the evaluations do not conclude that the Beneficiary has a degree in computer science, engineering, technology, or science, or equivalent as required by the labor certification.

On appeal, the Appellant asserts that she has the U.S. equivalent of a bachelor's degree with major fields of study in finance and economics, which are both fields of science. However, the record contains no evidence establishing that the Beneficiary has a bachelor's degree in finance. None of the evaluations equate her education to a bachelor's degree in finance, and her degrees and transcripts do not show that she has a degree in finance. Even if we accepted the Appellant's unsupported assertion that the Beneficiary has a bachelor's degree in finance, the Appellant has submitted no evidence on appeal establishing that the Beneficiary's finance curriculum was in the field of science.[23] We note that [redacted] has a college of arts and commerce, which

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[21] Specifically, the [redacted] evaluation equates the Beneficiary's three-year bachelor of arts degree to three years of undergraduate study, and it equates the Beneficiary's two-year MBA to a bachelor of science degree in business administration from an accredited U.S. institution. The evaluation states that she completed graduate level courses in business policy, investment management, industrial relations, and related subjects, and that based on the nature of the courses and the credit hours involved, her degree equated to a bachelor of science. Further, the [redacted] evaluation reviewed the Beneficiary's approximately nine years of work experience, and concluded that based on the three to one ratio for nonimmigrant visas, the Beneficiary's experience was comparable to "at least three years of college-level training required in connection with the attainment of a bachelor's degree" in the field of management information systems. The [redacted] evaluation used the rule applicable to H-1B nonimmigrant petitions to equate three years of experience for one year of education, but that equivalence does not apply to immigrant petitions. *See* 8 C.F.R. § 214.2(h)(4)(iii)(D)(*5*). The evaluation does not mention the Beneficiary's PGD.

[22] Inconsistencies in the record must be resolved with independent, objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. at 591-92.

[23] Citing the website Investopedia, the Beneficiary states in response to the NOIR that finance is an "art and a science." Investopedia, *Finance*, https://www.investopedia.com/terms/f/finance.asp (last visited Nov. 14, 2018). The website states:

> Finance, as a field of study and an area of business, definitely has strong roots in related-scientific areas, such as statistics and mathematics. Furthermore, many modern financial theories resemble scientific or mathematical formulas. However, there is no denying the fact that the financial industry also includes non-scientific elements that liken it to an art. For example, it has been discovered that

includes an MBA program, and a college of science and technology, which does not include an MBA program. also offers a bachelor of science degree, which the Beneficiary did not receive.[24]

Further, of the four evaluations in the record, only one, the WES evaluation, concluded that she had a bachelor's degree in economics. As we noted, the WES evaluation contained only two pages and provided no support for its conclusions, and it conflicts with the other evaluations in the record. Thus, it is not credible evidence of the Beneficiary's education. Even if we accepted WES' conclusion that the Beneficiary has a bachelor's degree in economics, the Appellant has submitted no credible evidence that establishes by a preponderance of the evidence that the Beneficiary's economics curriculum was in the field of science. Her unsupported statements on appeal carry limited weight and are insufficient evidence of her education.[25] We note that at graduate economics degrees are earned at the college of arts and commerce, and not at the college of science and technology.[26] Finally, the Appellant's claim that the Beneficiary has the U.S. equivalent of a bachelor's degree with major fields of study in finance and economics is not credible due to the conflicting assertion on the labor certification that she has a bachelor's degree in computer science.[27]

The Appellant has not established by a preponderance of the evidence that the Beneficiary possessed the minimum education required by the labor certification as of the priority date. The petition's approval was properly revoked on this basis.

B. Location of Employment

The Director determined that the Petitioner did not intend to employ the Beneficiary at the location listed on the labor certification and petition. Section 212(a)(5)(A)(i) of the Act provides that foreign nationals are inadmissible to the United States unless DOL has determined that:

> human emotions (and decisions made because of them) play a large role in many aspects of the financial world.

An appellant must support its assertions with relevant, probative, and credible evidence. *See Matter of Chawathe*, 25 I&N Dec. 369, 376 (AAO 2010). This website is not probative or credible evidence establishing that the Beneficiary's finance curriculum was in the field of science, rather than in the arts.

[24] /academics/courses-offered (last visited Nov. 14, 2018).

[25] An appellant must support its assertions with relevant, probative, and credible evidence. *See Matter of Chawathe*, 25 I&N Dec. at 376. We note that the *New York Times* article cited by the Beneficiary in response to her NOIR is the opinion of its writer; it is not a factual article. It was located in the Op-Ed section of the newspaper. New York Times, *Yes, Economics is a Science*, https://www.nytimes.com/2013/10/21/opinion/yes-economics-is-a-science.html (last visited Nov. 14, 2018). Therefore, it carries no evidentiary weight in these proceedings.

[26] /academics/courses-offered (last visited Nov. 14, 2018).

[27] On another subsequently filed labor certification by a different employer, the Beneficiary's education was described as a bachelor's degree in business administration issued in 1994 by The inconsistencies in the record have not been resolved with independent, objective evidence pointing to where the truth lies. *See Matter of Ho*, 19 I&N Dec. at 591-592.

> (I) there are not sufficient workers who are able, willing, qualified... and available at the time of application for a visa and admission to the United States and at the place where the alien is to perform such... labor, and
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> (II) the employment of such alien will not adversely affect the wages and working conditions of workers in the United States similarly employed.

Thus, the DOL ensures that the offered job does not adversely affect the labor market and that it is based on the job's geographical location.[28] A labor certification remains valid only for the geographic area of intended employment stated on it. 20 C.F.R. § 656.30(c)(2). If a petitioner intends to employ a beneficiary outside the stated area of employment, USCIS may deny the petition. *Matter of Sunoco Energy Dev. Co.*, 17 I&N Dec. 283, 284 (Reg'l Comm'r 1979).

On the labor certification and petition, the Petitioner identified the work location of the offered job as [redacted] New Jersey. Following approval of the petition, USCIS became aware that the Petitioner, its officer who signed the petition, and its contact person identified on the ETA Form 9089, had each engaged in immigration fraud. Further, the record contained inconsistencies in the Petitioner's work locations listed on the Beneficiary's Forms G-325A, Biographic Information forms, and the locations of the jobs listed on the Beneficiary's H-1B nonimmigrant visa petitions filed by the Petitioner. The NOIR advised the Petitioner and the Beneficiary of the inconsistencies in the record and requested evidence to establish that the Petitioner intended to employ the Beneficiary according to the terms of the labor certification.

On motion and in the delayed NOIR response, the Beneficiary asserted that the location of the Beneficiary's H-1B nonimmigrant employment with the Petitioner is irrelevant to the terms of the Petitioner's prospective permanent employment of the Beneficiary because the job was different. She asserted that any misrepresentation in the work location was immaterial to the labor certification because the prevailing wage and recruitment would have been the same, and that since the Beneficiary isn't relying on her employment with the Petitioner to qualify for the offered position, any discrepancies in the record regarding that experience are immaterial. She further claimed that the convictions of the Petitioner and its two officers are immaterial because her employment with the Petitioner was valid.

In her October 30, 2017, decision, the Director stated that the inconsistencies in the Petitioner's work locations listed on the Beneficiary's Forms G-325A and the locations of the jobs listed on the Beneficiary's H-1B nonimmigrant visa petitions filed by the Petitioner, together with the fraud convictions of the Petitioner and two of its officers, cast doubt on the veracity of the location of the offered job. *See Matter of Ho*, 19 I&N Dec. at 591-592. Unresolved material inconsistencies may lead us to reevaluate the reliability and sufficiency of other evidence submitted in support of the requested immigration benefit. *Id.* The Director determined that neither the Petitioner nor the

[28] The prevailing wage determination and the DOL's labor market test generally are based on the address where the offered job will be performed. See 20 C.F.R. §§ 656.10(c) and 656.40.

Beneficiary resolved the inconsistencies in the record with independent, objective evidence pointing to where the truth lies. *Id.*

On appeal, the Appellant does not refute the inconsistencies found between the locations stated on the H-1B petitions and the locations reported on the Beneficiary's Form G-325A. Rather, she reasserts that the location of the Beneficiary's H-1B nonimmigrant employment with the Petitioner is irrelevant to the terms of the Petitioner's prospective permanent employment of the Beneficiary. However, the Appellant provides no evidence on appeal to verify the location of the offered job. Her unsupported statements carry limited weight and are insufficient evidence of the location of the offered job.[29] Moreover, the Petitioner's misrepresentations of the Beneficiary's work locations on her H-1B nonimmigrant petitions cast doubt on whether the Petitioner had a place of business at [redacted] New Jersey where the Beneficiary could perform her proposed job duties. The Director detailed the misrepresentations at length in the prior decisions and the Appellant does not offer any evidence to contradict these misrepresentations.

The Beneficiary worked throughout the United States and in China during her employment with the Petitioner, but she does not appear to have ever worked at [redacted] New Jersey. While such prior employment is not required, the noted inconsistencies in the record regarding the Beneficiary's H-1B nonimmigrant employment cast doubt on the job location for the offered job.[30] When asked to resolve the inconsistencies, the Petitioner and the Beneficiary failed to do so. The record contains no lease, mortgage, or deed for the premises at [redacted] New Jersey. It contains no real estate licenses, business licenses, or other documentation showing the Petitioner's occupancy at that address. It contains no evidence that the Petitioner ever operated a business with employees there.

Further, the Appellant asserts that even if the Petitioner intended to employ the Beneficiary in multiple locations throughout the United States, it would not have affected the certification of the ETA Form 9089. The Appellant asserts that based on a 1994 DOL memo (Farmer memo), the labor certification should have been filed at the DOL location having jurisdiction over the Petitioner's main or headquarters office in the event the Petitioner intended to employ the Beneficiary in multiple locations. *See* Memorandum from Barbara Ann Farmer, Adm'r for Reg'l Mgmt., Div. of Foreign Labor Certification, DOL Field Memo No. 48-94 (May 16, 1994). As noted by the Director, the Farmer memo states that where a beneficiary will be working in various locations, the employer should indicate that the foreign national will be working "at various unanticipated locations throughout the United States." The Farmer memo also instructs the employer to include a short statement indicating "why it is not possible to predict where the work sites will be at the time the application is filed." *Id.* The record does not establish that the Petitioner disclosed to DOL on the labor certification, or to potential applicants during recruitment, that the offered job included work at

[29] An appellant must support its assertions with relevant, probative, and credible evidence. *See Matter of Chawathe*, 25 I&N Dec. at 376.

[30] Unresolved material inconsistencies may lead us to reevaluate the reliability and sufficiency of other evidence submitted in support of the requested immigration benefit. *See Matter of Ho*, 19 I&N Dec. at 591-592.

various unanticipated locations. Further, the record does not establish that [redacted] New Jersey, was the Petitioner's headquarters during the recruitment process.[31] A different headquarters location would have affected the certification of the ETA Form 9089 and the pool of interested and available U.S. workers who might have applied if the true facts had been known.

The Appellant also states that since the Beneficiary isn't relying on her employment with the Petitioner to qualify for the offered job, that any discrepancies in the record regarding that experience are immaterial. We disagree. The noted inconsistencies in the record regarding the Beneficiary's H-1B nonimmigrant employment with the Petitioner, together with the plea agreements admitting to fraud by the Petitioner and two of its officers, cast doubt on the job location for the offered job. When asked to resolve the inconsistencies with independent, objective evidence of the offered job's work location, the Petitioner and the Beneficiary failed to do so. *Matter of Ho*, 19 I&N Dec. at 591-592. Unresolved material inconsistencies may lead us to reevaluate the reliability and sufficiency of other evidence submitted in support of the requested immigration benefit. *Id.*

The Appellant also asserts that the fraud convictions of the Petitioner's officers should not be considered because they are not relevant to the labor certification in this case. She states that neither [redacted] nor [redacted] signed the labor certification. However, [redacted] is listed as the Petitioner's contact at Part D. of the labor certification, and his email address is provided. Further, [redacted] signed the Form I-140 petition and the supporting letter from the Petitioner in this case, and the labor certification was submitted to USCIS with the signed petition as required initial evidence.[32] Further, the Petitioner pled guilty to mail fraud in connection with its nonimmigrant petitions, and it filed both the labor certification and petition.[33] Therefore, the plea agreements admitting to fraud, together with the other detailed unresolved inconsistencies in the record, constituted good and sufficient cause for the Director to issue the NOIR. Good and sufficient cause exists to issue a NOIR where the record at the time of the notice's issuance, if unexplained or unrebutted, would have warranted the petition's denial. *Matter of Estime*, 19 I&N Dec. 450, 451 (BIA 1987). The Petitioner's intent to employ the Beneficiary outside the stated area of employment would have warranted the petition's denial in this case.

The Appellant also asserts that a Petitioner does not have to demonstrate to USCIS that the labor certification is free from misrepresentations, and that USCIS' only remedy is to invalidate the labor

[31] The Beneficiary's paychecks and IRS Form W-2, Wage and Tax Statement, in 2005 list a [redacted] Pennsylvania address for the Petitioner, and her paychecks and Form W-2 in 2006 list the Petitioner's address as [redacted] New Jersey [redacted]

[32] A petition for an advanced degree professional must be accompanied by a valid, individual labor certification, an application for Schedule A designation, or documentation of a beneficiary's qualifications for a shortage occupation. 8 C.F.R. § 204.5(k)(4)(i).

[33] Within the adjudication of a visa petition, fraud or material misrepresentation will undermine the probative value of the evidence and lead to a reevaluation of the reliability and sufficiency of the remaining evidence. *Matter* of *Ho*, 19 I&N Dec. at 591 -592.

certification in the event of fraud or material misrepresentation. This argument is unclear, as the material misrepresentations in this case resulted in invalidation of the labor certification.[34]

Finally, the Appellant asserts that the she is unable to contact the officers of the Petitioner because of the passage of time, and that USCIS has deprived the Appellant of a reasonable opportunity to obtain evidence regarding the proposed grounds of revocation. However, the petition was initially approved in error and the Director had good and sufficient cause to revoke petition's approval upon realization of the error, even if that realization occurred many years after the petition was approved.[35] The mere passage of time does not shift the burden of proof from the Appellant, or cause an invalid petition to become valid.

The Appellant has not established by a preponderance of the evidence that the Petitioner intended to employ the Beneficiary at the location listed on the labor certification. The petition's approval was properly revoked on this basis.

C. Ability to Pay the Proffered Wage

The Director further found that the record did not demonstrate the Petitioner's ability to pay from the priority date onward, as required by 8 C.F.R. § 204.5(g)(2). Because the other issues discussed in this case are dispositive, we reserve and decline to make a determination on the Petitioner's ability to pay at this time.

IV. WILLFUL MISREPRESENTATION OF A MATERIAL FACT AND INVALIDATION OF THE LABOR CERTIFICATION

In addition to the grounds of revocation discussed above, the Director also found that the Petitioner and/or the Beneficiary committed a willful misrepresentation of a material fact on three separate issues. For the following reasons, we uphold the Director's findings.

A. Willful Misrepresentation of a Material Fact

Any foreign person who, by fraud or willfully misrepresenting a material fact, seeks to procure (or has sought to procure or has procured) a visa, other documentation, or admission into the United States or other benefit provided under the Act is inadmissible. *See* section 212(a)(6)(C)(i) of the Act, 8 U.S.C. § 1182(a)(6)(C)(i).

As outlined by the Board, a material misrepresentation requires that one willfully make a material misstatement to a government official for the purpose of obtaining an immigration benefit to which

[34] The appeal brief references another beneficiary's name unconnected to this case, indicating that the material may have been copied from another document which resulted in a disjointed discussion of the issue.

[35] After granting a petition, USCIS may revoke the petition's approval "at any time" for good and sufficient cause. Section 205 of the Act, 8 U.S.C. § 1155.

one is not entitled. *Matter of Kai Hing Hui*, 15 I&N Dec. 288, 289-90 (BIA 1975). The term "willfully" means knowing and intentionally, as distinguished from accidentally, inadvertently, or in an honest belief that the facts are otherwise. *See Matter of Tijam*, 22 I&N Dec. 408, 425 (BIA 1998); *Matter of Healy and Goodchild*, 17 I&N Dec. 22, 28 (BIA 1979). To be considered material, the misrepresentation must be one which "tends to shut off a line of inquiry which is relevant to the alien's eligibility, and which might well have resulted in a proper determination that he be excluded." *Matter of Ng*, 17 I&N Dec. 536, 537 (BIA 1980).

Accordingly, for an immigration officer to find a willful and material misrepresentation in visa petition proceedings, he or she must determine: 1) that the petitioner or beneficiary made a false representation to an authorized official of the United States government; 2) that the misrepresentation was willfully made; and 3) that the fact misrepresented was material. *See Matter of M-*, 6 I&N Dec. 149 (BIA 1954); *Matter of L-L-*, 9 I&N Dec. 324 (BIA 1961); *Matter of Kai Hing Hui*, 15 I&N Dec. at 288.

1. Beneficiary's Education

The Director determined that the Petitioner and the Beneficiary willfully misrepresented the Beneficiary's major field of study at Part J of the ETA Form 9089.[36] This is material to the Beneficiary's qualifications for the offered position.

The Beneficiary received a bachelor of arts degree from in India in 1991, where she studied English, Hindi, politics, philosophy, and economics. She also earned an MBA from in 1994, and she received a PGD in computer applications from in 1997.[37] In the NOIR dated December 13, 2016, the Director advised the Petitioner and the Beneficiary that the representation on the labor certification that the Beneficiary has bachelor's degree in computer science appears false, as the evidence establishes that the Beneficiary does not have a bachelor's degree in computer science awarded by or any other university.[38] The NOIR requested evidence of the Beneficiary's bachelor's degree in computer science.

[36] A misrepresentation can be made to a government official in an oral interview, on the face of a written application or petition, or by submitting evidence containing false information. INS Genco Op. No. 91-39, 1991 WL 1185150 (Apr. 30, 1991).

[37] At Part J of the labor certification, the Beneficiary listed her highest level of education as a bachelor's degree in computer science completed in 1994 at in India. Therefore, the PGD was not included on the labor certification.

[38] USCIS will deny a visa petition if the petitioner submits evidence which contains false information. In general, a few errors or minor discrepancies are not reason to question the credibility of an alien or an employer seeking immigration benefits. *See Spencer Enters. Inc. v. U.S.*, 345 F.3d 683, 694 (9th Cir. 2003). However, if a petition includes serious errors and discrepancies, and the petitioner fails to resolve those errors and discrepancies after an officer provides an opportunity to rebut or explain, then the inconsistencies will lead USCIS to conclude that the claims stated in the petition are not true. *See Matter of Ho*, 19 I&N Dec. at 591.

On February 28, 2017, the labor certification was invalidated pursuant to 20 C.F.R. § 656.30(d) due to the Petitioner's and Beneficiary's willful misrepresentation of the Beneficiary's major field of study at Part J of the ETA Form 9089, after it was determined that neither the Petitioner nor the Beneficiary responded to the NOIR.

In her October 30, 2017, decision, the Director noted that the Beneficiary's education was described on the labor certification as a bachelor's degree in computer science issued in 1994 by [redacted] On another subsequently filed labor certification by a different employer, the Beneficiary's education was described as a bachelor's degree in business administration issued by [redacted] in 1994. The Director determined that the Beneficiary does not have a bachelor's degree in computer science awarded by [redacted] or any other university. Thus, she determined that the information regarding the Beneficiary's education at Part J of the labor certification is false, and that the labor certification was properly invalidated due to the false representation of a material fact on the labor certification.

Here, the Appellant does not dispute that the Petitioner and the Beneficiary willfully misrepresented the Beneficiary's education on the labor certification by falsely certifying that the Beneficiary possesses a bachelor's degree in computer science.[39] Instead, on appeal, the Appellant states that "[a]ny purported misrepresentation of the Beneficiary's education is immaterial because... [she] actually qualified for the position." We disagree. The level and field of education are material to the position's minimum requirements identified on the labor certification, and they are material to the DOL's labor market test. The Beneficiary's education is also material to the statutory requirement at section 203(b)(2) of the Act, and the regulatory criterion at 8 C.F.R. § 204.5(k) relating to the advanced degree professional classification. The misrepresentation regarding the Beneficiary's major field of study on the labor certification cut off a potential line of inquiry regarding her claimed education that would have impacted the decisions of the DOL and USCIS. *See Matter of Ng*, 17 I&N Dec. at 537.

The Beneficiary does not have a bachelor's degree in computer science as represented on the labor certification. None of the evaluations submitted to the record determined that the Beneficiary had a bachelor's degree in computer science. The Petitioner and the Beneficiary willfully misrepresented material facts regarding the Beneficiary's education. The Director advised the Petitioner and the Beneficiary that the discrepancies, if unresolved, could lead us to conclude that the evidence concerning the Beneficiary's education is not credible. In light of the contradictory evidence and information in the record regarding the Beneficiary's major field of study, we conclude that the Petitioner's and the Beneficiary's misrepresentations were material to the Beneficiary's eligibility.

The Petitioner has sought to procure a benefit provided under the Act through the willful misrepresentation of material facts. By signing the labor certification, the Beneficiary sought to procure a benefit provided under the Act through the willful misrepresentation of a material fact that cut off a line of inquiry relevant to the Beneficiary's eligibility. Accordingly, we agree with the

[39] Both parties signed the labor certification under penalty of perjury attesting to the veracity of the education listed.

Director's finding that the Petitioner and the Beneficiary made a willful misrepresentation of material fact.

2. Beneficiary's Employment

The Director determined that the Petitioner and the Beneficiary willfully misrepresented the Beneficiary's employment with [redacted] on the labor certification. This is material to the Beneficiary's qualifications for the offered position because she relied on this experience to meet the terms of the labor certification.[40] The labor certification lists the Beneficiary's employment as an IT Manager with [redacted] in [redacted] India from December 1, 1995, to January 1, 1998.[41] The supporting letter dated February 1, 1998, from [redacted] indicates that the Beneficiary's job title was assistant manager in the area of secondary market operations and corporate finance.

In the NOIR dated December 13, 2016, the Director advised the Petitioner and the Beneficiary that the Beneficiary's employment with [redacted] described in Part K.d. (Job 4) (addendum) of the labor certification is not corroborated by the [redacted] letter dated February 1, 1998. The letter states a different job title than the one listed on the labor certification, and the job duties listed in the letter are significantly disparate from the duties of job stated on the labor certification. The NOIR also noted that the duties with [redacted] claimed on the labor certification are nearly identical to the duties claimed in Part K.b. (Job 2)(addendum) which pertains to the Beneficiary's employment with [redacted] The NOIR indicated that the nearly identical wording of duties performed for two positions with unrelated employers cast doubt on the duties claimed with [redacted][42]

On February 28, 2017, the labor certification was invalidated pursuant to 20 C.F.R. § 656.30(d) due to the Petitioner's and Beneficiary's willful misrepresentation of the Beneficiary's experience with [redacted] at Part K.d. (Job 4) (addendum) of the labor certification, after it was determined that neither the Petitioner nor the Beneficiary responded to the NOIR.

In her October 30, 2017, decision, the Director addressed the Beneficiary's assertion that the representations on the labor certification should be considered more reliable than the representations in the letter from [redacted] because the Petitioner affirmed the representations on the labor certification. The Director noted the convictions of the Petitioner and the Petitioner's officers and

[40] The requirements of the offered position are a bachelor's degree in computer science, engineering, technology, science, or equivalent, and three months of experience in the job offered or 60 months in an alternate occupation (senior software engineer, technical architect, or software engineer). Alternatively, the position requires a master's degree and two years of experience.

[41] On another ETA Form 9089 signed by the Beneficiary on June 17, 2014, the Beneficiary certified that she worked as a business analyst for [redacted] in India from December 1, 1995, to January 1, 1998. She listed her duties as equity research, secondary market operations, corporate finance, and MIS. She has not resolved the inconsistencies between the two labor certifications in the record, and the experience letter from [redacted], with independent, objective evidence. *See Matter of Ho*, 19 I&N Dec. at 591-592.

[42] Doubt cast on any aspect of the petitioner's proof may undermine the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Matter of Ho*, 19 I&N Dec. at 591-92.

determined that the representations on the labor certification cannot be considered more reliable than the representations from [redacted] a company that employed the Beneficiary and certified her duties. Thus, she determined that the information regarding the Beneficiary's experience at Part K of the labor certification is false, and that the labor certification was properly invalidated due to the false representation of a material fact on the labor certification.

Here, the Petitioner and the Beneficiary willfully misrepresented the Beneficiary's experience on the labor certification by falsely certifying that the Beneficiary worked for [redacted] as an IT Manager. Both parties signed the labor certification attesting to the veracity of the Beneficiary's job title and duties at [redacted] When given the opportunity to address the inconsistencies in the record regarding the Beneficiary's experience with [redacted] the attestations on the labor certification were not claimed to be accidental or inadvertent. On appeal, the Appellant states that any conflict between the experience letters and the representations made on the labor certification are immaterial, because the letters establish that the Beneficiary has the experience required for the offered position. We disagree. The Beneficiary's experience is material to the whether she meets the minimum requirements of the offered position. Her experience is also material to the statutory requirement at section 203(b)(2) of the Act, and the regulatory criterion at 8 C.F.R. § 204.5(k) relating to the advanced degree professional classification. Because she does not have an advanced degree, the Beneficiary must possess a bachelor's degree followed by five years of experience in the specialty to qualify as an advanced degree professional. The labor certification listed employment with three employers that might provide her with five years of qualifying experience.[43] However, her employment with [redacted] and [redacted] in [redacted] India totaled less than five years. Thus, her employment with [redacted] is vital to her qualification as an advanced degree professional. The misrepresentation regarding the Beneficiary's experience with [redacted] on the labor certification cut off a potential line of inquiry regarding her claimed experience. *See Matter of Ng*, 17 I&N Dec. at 537. Thus, as set forth herein, the Beneficiary is not qualified for the requested visa classification as a professional holding an advanced degree because she does not have a bachelor's degree followed by five years of experience in the specialty.

On appeal, the Appellant asserts that "USCIS does not dispute that the beneficiary worked at [redacted] as a manager working with management information systems. She therefore was an IT manager regardless of the nominal title assigned to her." We disagree. [redacted] letter clearly states that the Beneficiary worked as an assistant manager in the area of secondary market operations and corporate finance, not IT or management information systems.

The Appellant further asserts on appeal that USCIS has offered no reason why it should believe the assertions of [redacted] above those of the beneficiary as to what her duties were in that position." However, the Director clearly indicated in her decision that the representations of [redacted] are more reliable because it employed the Beneficiary and certified her duties. The Director

[43] In addition to [redacted], the labor certification listed the Beneficiary's employment with [redacted] in [redacted] India, from January 1, 1998, to June 30, 1999; and with [redacted] in [redacted] Michigan from April 1, 2000, to May 31, 2003.

also noted that the convictions of the Petitioner and the Petitioner's officers lessened the credibility of the certifications made by them. The Appellant asserts that any false statements made by the Petitioner's officers do not impact the Beneficiary's credibility. While this statement is true, the convictions do lessen the credibility of the Petitioner, who filed the labor certification and petition, and its two officers.

On appeal, the Appellant states that she cannot resolve the discrepancies regarding her employment with because the owner of is dead. However, she has provided no support for this assertion, and she has not indicated how the owner's death would prevent her from resolving the discrepancies in the record regarding her prior employment. Her unsupported statements carry limited weight and are insufficient evidence to resolve the discrepancies regarding of her employment with [44]

The Petitioner and the Beneficiary willfully misrepresented material facts regarding the Beneficiary's previous employment with The Director advised the Petitioner and the Beneficiary that the discrepancies, if unresolved, could lead us to conclude that the evidence concerning the Beneficiary's experience is not credible. In light of the contradictory evidence and information in the record regarding the Beneficiary's experience with we conclude that the Petitioner's and the Beneficiary's misrepresentations were material to the Beneficiary's eligibility.

The Petitioner has sought to procure a benefit provided under the Act through the willful misrepresentation of material facts. By signing the labor certification, the Beneficiary sought to procure a benefit provided under the Act through the willful misrepresentation of a material fact. Accordingly, we agree with the Director's finding that the Petitioner and the Beneficiary made willful misrepresentations of material fact.

3. Location of Employment

The Director determined that the Petitioner willfully misrepresented the offered job's primary worksite at Part H.1-2 of the ETA Form 9089.

On the labor certification and petition, the Petitioner identified the work location of the offered job as New Jersey. In the NOIR dated December 13, 2016, the Director advised the Petitioner and the Beneficiary that based on the Beneficiary's H-1B nonimmigrant employment for the Petitioner, and other unresolved inconsistencies in the record, it appears more likely than not that the Petitioner willfully misrepresented the offered job's primary worksite on the ETA Form 9089. The NOIR indicated that this misrepresentation cut off a line of inquiry critical to DOL in assessing the merits of the labor certification and to USCIS in assessing the *bona fides* of the petition and the Beneficiary's admissibility. The NOIR requested evidence of

[44] An appellant must support its assertions with relevant, probative, and credible evidence. *See Matter of Chawathe*, 25 I&N Dec. at 376.

the prospective work location, including all recruiting materials for the offered job; business records regarding the Beneficiary's work location during her nonimmigrant employment with the Petitioner; and evidence that the Petitioner conducted business and employed employees at the proposed work location in New Jersey.

On February 28, 2017, the labor certification was invalidated pursuant to 20 C.F.R. § 656.30(d) due to the Petitioner's willful misrepresentation of the offered job's primary worksite at Part H.1-2 of the ETA Form 9089, after it was determined that neither the Petitioner nor the Beneficiary responded to the NOIR. On motion and in her delayed NOIR response, the Beneficiary referred to her response to the Director's revocation based on the location of employment referenced in Section III.B. above.

In her October 30, 2017, decision, the Director stated that the location of the Beneficiary's H-1B nonimmigrant employment with the Petitioner is relevant to the terms of the Petitioner's prospective permanent employment of the Beneficiary because it shows the Petitioner's history of misrepresenting the work location, and casts doubt on the veracity of the work location listed on the labor certification. The Director stated that the Petitioner's intent to employ the Beneficiary in locations throughout the United States is material to DOL's processing of the labor certification. The convictions of the Petitioner's officers' for fraud in cases with the same fact pattern are material to this case because they cast doubt on the veracity of the claimed work location.

Here, the Petitioner willfully misrepresented the location of the offered job. The Petitioner signed the labor certification and attested to the job location. The attestation was not claimed to be accidental or inadvertent. On appeal, the Appellant asserts that where she worked as an H-1B nonimmigrant is irrelevant to this matter, as the labor certification is an offer of prospective employment. However, the Petitioner's misrepresentations of the Beneficiary's work locations on her H-1B nonimmigrant petitions cast doubt on whether the Petitioner had a place of business at [redacted] New Jersey where the Beneficiary could perform her proposed job duties.

Further, the Appellant asserts that even if the Petitioner intended to employ the Beneficiary in multiple locations throughout the United States, such a misrepresentation would be immaterial because it would not have affected the outcome of the case. We disagree. The location of the offered job is material to DOL's prevailing wage determination and the validity of its labor market test. DOL guidance indicates that whenever the job requires work in various locations, the employer may use the company's headquarters as the work location. The employer must indicate that the beneficiary will be working at various unanticipated locations throughout the *See* Memorandum from Barbara Ann Farmer, Adm'r for Reg'l Mgmt., Div. of Foreign Labor Certification, DOL Field Memo No. 48-94 (May 16, 1994). However, the record does not establish that the Petitioner's headquarters was located at [redacted] New Jersey. Further, the record does not establish that the Petitioner disclosed to DOL on the labor certification, or to potential applicants during recruitment, that the offered job included work at various unanticipated locations. The petition seeks an employment-based immigrant classification for the Beneficiary, and therefore the verifiable existence of the employer and the job offer are material to the petition. The

Petitioner's intent to employ the Beneficiary outside the stated area of employment would have warranted the petition's denial in this case. *See Matter of Ng*, 17 I&N Dec. at 537.

Further, on appeal, the Appellant reasserts that the lack of credibility of the Petitioner's officers is immaterial because neither of them signed the job offer contained on the labor certification. However, [redacted] is listed as the Petitioner's contact at Part D. of the labor certification, and his email address is provided. Further, [redacted] signed the Form I-140 petition and the supporting letter from the Petitioner in this case, and the labor certification was submitted to USCIS with the signed petition as required initial evidence. Further, the Petitioner pled guilty to mail fraud in connection with its nonimmigrant petitions, and it filed both the labor certification and petition. The credibility of the Petitioner's officers, who direct the business of the Petitioner, is material to these proceedings.

The Petitioner willfully misrepresented the location of the offered job. The Director advised the Petitioner and the Beneficiary that the discrepancies, if unresolved, could lead us to conclude that the evidence concerning the job location is not credible. In light of the contradictory evidence and information in the record regarding the actual job location, we conclude that the Petitioner's misrepresentation was material to the Beneficiary's eligibility.

The Petitioner sought to procure a benefit provided under the Act through the willful misrepresentation of material facts. Accordingly, we agree with the Director's finding that the Petitioner made a willful misrepresentation of material fact.

B. Invalidation of the Labor Certification

The regulation at 20 C.F.R. § 656.30(d) provides, in pertinent part:

> Invalidation of labor certifications. After issuance, a labor certification may be revoked by ETA using the procedures described in Sec. 656.32. Additionally, after issuance, a labor certification is subject to invalidation by the DHS or by a Consul of the Department of State upon a determination, made in accordance with those agencies' procedures or by a court, of fraud or willful misrepresentation of a material fact involving the labor certification application.

Based on the findings of willful misrepresentations of material facts involving the labor certification application, the Director properly invalidated the labor certification pursuant to 20 C.F.R. § 656. The Director determined that the petition's approval was, in addition to the other grounds of revocation, automatically revoked pursuant to 8 C.F.R. § 205.1(a)(3)(iii)(A),[45] based on the invalidation of the labor certification.

[45] Pursuant to 8 C.F.R. § 205.1(a)(3)(iii)(A), a petition is automatically revoked if the labor certification is invalidated pursuant to 20 C.F.R. § 656.

On appeal, the Beneficiary claims that the regulation at 20 C.F.R. § 656.30(d) is *ultra vires* as an "impermissible attempt to delegate final authority over the issuance of labor certifications" from the DOL to DHS. However, we lack authority to deem a regulation *ultra vires* and therefore, this appeal is not the proper venue for determination of such an issue.[46] For this reason, we decline to disturb the Director's decision on this issue.

V. WITHDRAWAL REQUEST

On October 11, 2016, while the case was on certification to us, counsel for the Beneficiary and CNC filed a "Notice of Withdrawal of Petition." In the notice, counsel stated that "both of these parties are now withdrawing this petition." Counsel cited *Matter of Cintron*, 16 I&N Dec. 9 (BIA 1976), in support of the assertion that the withdrawal mooted the certification of the case to us. We subsequently remanded the case to the Director for continued review and processing.

In the NOIR and in her October 30, 2017, decision, the Director acknowledged the withdrawal request but indicated that it had no preclusive effect on USCIS' authority to revoke the petition's approval for good and sufficient cause. She indicated that the regulation at 8 C.F.R. § 103.2(b)(6) specifically states that only the petitioner may withdraw a benefit request.[47]

In this case, the Petitioner is VSG, not CNC. In her October 30, 2017, decision, the Director denied the request of CNC and the Beneficiary to withdraw the petition. The Director found that *Matter of Cintron* does not address withdrawal in the context of the revocation of an approved petition.[48] The Director also noted that even if USCIS accepted the withdrawal, according to *Matter of Al Wazzan*, 25 I&N Dec. 359 (AAO 2010), and USCIS policy, the Beneficiary must have been eligible for the requested visa classification in order to port under AC21.[49] Here, as set forth herein, the Beneficiary was not eligible for the advanced degree professional classification. The Director noted the Ninth Circuit's decision in *Herrera v. USCIS*, 571 F.3d 881 (9th Cir. 2009), which held that the

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[46] In *Matter of Hernandez-Puente*, the Board found that it was not the province of the Board or immigration judges to pass upon the validity of the regulations and statutes that they administer. *Matter of Hernandez-Puente*, 20 I&N Dec. at 339 (*citing Matter of Patel*, 19 I&N Dec. 774 (BIA 1988); *Matter of Valdovinos*, 18 I&N Dec. 343 (BIA 1982); *Matter of Bogart*, 15 I&N Dec. 552 (BIA 1975, 1976; AG 1976); *Matter of Chavarri-Alva*, 14 I&N Dec. 298 (BIA 1973)).

[47] The regulation at 8 C.F.R. § 103.2(b)(6) states, in part, that "[a]n applicant or petitioner may withdraw a benefit request at any time until a decision is issued by USCIS or, in the case of an approved petition, until the person is admitted or granted adjustment or change of status, based on the petition."

[48] In *Matter of Cintron*, the petitioner filed a letter withdrawing the petition before a decision had been rendered. The Board determined that a petitioner may withdraw a petition before a decision has been rendered. *Matter of Cintron*, 16 I&N Dec. at 9.

[49] In *Matter of Al Wazzan*, we found that in order to be considered valid for job portability purposes, a visa petition must have been filed for a person who is entitled to the requested visa classification and that petition must have been approved by USCIS. An invalid petition is not made "valid" solely from the passage of 180 days' pending time. *Matter of Al Wazzan*, 25 I&N Dec. at 367. In addition to *Matter of Al Wazzan*, the Director referenced chapter 20.2(c) of the USCIS Adjudicator's Field Manual (AFM), which discusses the validity of a petition after revocation or withdrawal. *See* USCIS AFM, 20.2, https://www.uscis.gov/ilink/docView/AFM/HTML/AFM/0-0-0-1/0-0-0-2872/0-0-0-2977.html#0-0-0-375 (last visited Nov. 14, 2018).

government's authority to revoke the approval of a Form I-140 under section 205 of the Act survived portability under section 204(j) of the Act. Thus, with respect to petitions described in section 204(j) of the Act, the Director determined that USCIS retains the statutory authority to revoke an approval of a Form I-140 under section 205 of the Act when the petition is not or was not valid.

Prior to January 17, 2017, a petition's approval was automatically revoked upon written notice of withdrawal filed by the petitioner. *See* 8 C.F.R. § 205.1(a)(3)(iii)(C) (2016). On January 17, 2017, amended regulations took effect, barring automatic revocation of a petition's approval if notice of withdrawal was received 180 or more days after the petition's approval, or after a filing of an associated adjustment application. *See* Retention of EB-1, EB-2, and EB-3 Immigrant Workers and Program Improvements Affecting High-Skilled Nonimmigrant Workers, 81 FR 82398 (Nov. 18, 2016). The regulation includes language allowing for revocation on other grounds. 8 C.F.R. § 205.1(a)(3)(iii)(C).

On appeal, the Appellant asserts that the petition's approval was automatically revoked based on its withdrawal by the Beneficiary and her subsequent employer. The Appellant asserts that the phrase "an applicant or petitioner" at 8 C.F.R. § 103.2(b)(6) is a shortened form of "an applicant or a petitioner" and that by allowing for an "unspecified referent," the regulation allows for more than one entity to fit the definition of "petitioner" for purposes of withdrawing a petition. We disagree. In interpreting regulations, we must give effect to the ordinary meanings of their words and use common sense. *Matter of N-B-*, 22 I&N Dec. 590, 592 (BIA 1999) (citations omitted). The phrases "an applicant or petitioner" and "the applicant or petitioner" are used throughout 8 C.F.R. § 103.2 to describe a single applicant or petitioner. *See, e.g.*, 8 C.F.R. §§ 103.2(a)(2), (b)(1), (b)(14). The articles "a," "an," and "the" are used to describe terms that have a singular meaning in the context of their usage. Specifically, in employment-based immigration cases, "a" petitioner or "the" petitioner is the employer who files the initial immigration benefit request with USCIS. *See* section 203(b)(2) of the Act, 8 U.S.C. § 1153(b)(2). Although AC21 contemplates "new employers in the porting scheme it creates, it does so only as a result of giving the beneficiary the independence to choose a new employer." *Matter of V-S-G- Inc.*, Adopted Decision 2017-06 at *13 (AAO Nov. 11, 2017). AC21 has not changed the ordinary meaning of 8 C.F.R. § 103.2(b)(6) and does not give a subsequent employer withdrawal rights.

The Appellant also cites the decisions in *Mantena v. Johnson*, 809 F.3d 721 (2d Cir. 2015), and *Musunuru v. Lynch*, 831 F.3d 880 (7th Cir. 2016), for the proposition that the subsequent employer in the AC21 context should be treated as the *de facto* petitioner with all rights of the original petitioner, including the right to withdraw the petition. We disagree. In *Mantena*, the Second Circuit found that plaintiff was within the zone of interest protected by the Form I–140 visa petition process, but remanded for the district court to determine if the Act, as amended by AC21, requires notice pertaining to a visa petition's revocation to parties in addition to the original petitioner of the immigrant visa. *Mantena*, 809 F.3d at 736. The court specifically limited its holding to the right to receive notices in revocation proceedings, and stated that it would not expand its holding to other rights of a petitioner. *Id.* The court did not indicate that CNC should be able to effect a withdrawal pursuant to 8 C.F.R. § 103.2(b)(6).

The court in *Musunuru* determined that the beneficiary's subsequent employer was entitled to notice and an opportunity to respond in revocation cases. *Musunuru*, 831 F.3d at 890. The court's holding in *Musunuru* is not binding outside of the Seventh Circuit, which covers Illinois, Indiana, and Wisconsin.[50] Further, in *Matter of V-S-G- Inc.*, we determined that a subsequent employer to whom an AC21 beneficiary is porting is *not* an affected party who may participate in proceedings related to the underlying visa petition. *Matter of V-S-G- Inc.*, Adopted Decision 2017-06 at *12-13. We acknowledged that the Seventh Circuit recently held to the contrary in *Musunuru* and respectfully disagreed with the court's conclusion. *Id.* at 13. We noted that "the new employer did not pay for the filing, is not responsible for maintaining the petition, is not liable for the original petitioner's compliance or malfeasance associated with it, and cannot withdraw the petition if it no longer requires the beneficiary's services." *Id.* Citing *Clarke v. Sec. Indus. Ass'n*, 479 U.S. 388, 399 (1987), we concluded that "new employers' interests are so marginally related to and inconsistent with the purposes implicit in the AC21 statute that we do not believe Congress intended to permit their participation in other employers' administrative proceedings." *Matter of V-S-G- Inc.*, Adopted Decision 2017-06 at *13. CNC cannot effect a withdrawal pursuant to 8 C.F.R. § 103.2(b)(6).

The Appellant also asserts on appeal that she "has the right to withdraw the petition even if the substitute petitioner does not." She cites *Matter of V-S-G- Inc.* and asserts that she has become a self-petitioner with the right to withdraw this petition. We disagree. *Matter of V-S-G- Inc.* did not hold that a beneficiary becomes a self-petitioner. In *Matter of V-S-G- Inc.*, we held that "[b]eneficiaries of valid employment-based immigrant visa petitions who are eligible to change jobs or employers ("port") and who have properly requested to do so under section 204(j)... are 'affected parties' under DHS regulations for purposes of revocation proceedings. . . ." *Matter of V-S-G- Inc.*, Adopted Decision 2017-06 at *1. As a result, if we determine that a beneficiary is eligible to and has properly requested to port under AC21 to a qualifying job, USCIS will afford the beneficiary notice of intent to revoke the underlying Form I-140 and an opportunity to reply before it is revoked. *Id.* at *10. In *Matter of V-S-G- Inc.*, we noted that "the law includes certain exceptions to allow for discrete classes of individuals to self-petition for immigration benefits" and that the "very grounds for benefit eligibility indicate why a separate, traditional petitioner is not required." *Id.* at *5 n.12. However, in AC21 cases, even if a beneficiary has properly requested to port to a new employer, the original petitioner remains an affected party. *Id.* at 12. The Beneficiary has not become a self-petitioner with the right to withdraw the petition in this case.

The Appellant has not established by a preponderance of the evidence that petition's approval was automatically revoked based on its withdrawal by the Beneficiary and her subsequent employer. Neither the Beneficiary nor CNC is authorized to submit a withdrawal request.

[50] We are bound by the Act, agency regulations, precedent decisions of the agency, and published decisions from the circuit court of appeals within the circuit where the action arose. *See N.L.R.B. v. Ashkenazy Prop. Mgmt. Corp.* 817 F.2d 74, 75 (9th Cir. 1987); *R.L. Inv. Ltd. Partners v. INS*, 86 F. Supp. 2d 1014, 1022 (D. Haw. 2000), *aff'd*, 273 F.3d 874 (9th Cir. 2001).

VI. AUTOMATIC REVOCATION ASSERTIONS ON APPEAL

On appeal, the Appellant asserts for the first time that the petition's approval was automatically revoked based on the Petitioner's business termination no later than January 29, 2015. The Appellant claims that the automatic revocation of the petition's approval prior to the Director's revocation decision on February 28, 2017, prevented it from being revoked again on notice. Prior to January 17, 2017, a petition's approval was automatically revoked upon termination of an employer's business. *See* 8 C.F.R. § 205.1(a)(3)(iii)(D) (2016). On January 17, 2017, amended regulations took effect, barring automatic revocation of a petition's approval if termination of a petitioner's business occurred 180 or more days after the petition's approval, or after a filing of an associated adjustment application. *See* Retention of EB-1, EB-2, and EB-3 Immigrant Workers and Program Improvements Affecting High-Skilled Nonimmigrant Workers, 81 Fed. Reg. 82398 (Nov. 18, 2016). On appeal, the Appellant asserts that the prior regulation is applicable here, and that the petition's approval was automatically revoked based on the Petitioner's business termination prior to the implementation of the amended regulations.

Specifically, the Appellant states that the Petitioner "went out of business no later, and in fact certainly much earlier, than January 29, 2015." In support of this claim, she cites the holding in *Musunuru v. Lynch*, 831 F.3d at 880. The court in *Musunuru*, which also involved this Petitioner, stated that the Petitioner has "gone out of business." The Appellant also submits a settlement agreement dated November 22, 2016, filed in another case involving the Petitioner in the U.S. District Court for the District of New Jersey. The agreement indicates that the Petitioner has gone out of business, but it does not provide any other information relevant to the circumstances of the termination. The Appellant asserts that the automatic revocation of the petition's approval prior to the Director's revocation decision prevented it from being revoked again.

Based on our review of the record, we agree that the Petitioner's business termination prior to the enactment of the January 2017 regulations triggered the automatic revocation of the petition's approval. We further note that this automatic revocation based on the regulations in place prior to January 2017 prevents the Beneficiary from using this Form I-140 as the basis of a request to port and likewise bars the retention of the related priority date. *See* Memorandum from William R. Yates, Associate Director for Operations, USCIS, HQPRD 70/6.2.8-P, *Interim Guidance for Processing Form I-140 Employment-Based Immigrant Petitions and Form I-485 and H-1B Petitions Affected by the American Competitiveness in the Twenty-First Century Act of 2000 (AC21) (Public Law 106-313)* 3 (Dec. 27, 2005), http://www.uscis.gov/laws/policy-memoranda; *see also* 8 C.F.R. 204.5(e) (2016).

VII. CONCLUSION

We find the petition's approval was automatically revoked because of the Petitioner's business termination. We further find that the Director properly revoked the approval of the petition because the job offer portion of the labor certification does not demonstrate that the position requires a professional holding an advanced degree or the equivalent; the Beneficiary does meet the

requirements for the offered job; the Beneficiary does not qualify as a member of the professions holding an advanced degree; the Petitioner did not have the ability to pay the proffered wage from the priority date; the Petitioner did not intend to employ the Beneficiary at the location listed on the labor certification and petition; and the petition's approval was automatically revoked pursuant to 8 C.F.R. § 205.1(a)(3)(iii)(A), based on the invalidation of the labor certification filed in support of the petition. We further conclude that the Director properly invalidated the labor certification based on the willful misrepresentations of the Beneficiary and Petitioner relating to the Beneficiary's major field of study and experience, and the Petitioner's willful misrepresentation of the offered job's primary worksite.

ORDER: The appeal is dismissed.

Cite as *Matter of V-S-G-, Inc.*, ID# 1231623 (AAO Nov. 15, 2018)